

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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LESLIE F.,

Plaintiff,

v.

Civil Action No.  
8:22-CV-1338 (DEP)

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

COLLINS & HASSELER, PLLC  
225 State Street  
Carthage, NY 13619

LAWRENCE D. HASSELER, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.  
6401 Security Boulevard  
Baltimore, MD 21235

JASON P. PECK, ESQ.

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. § 405(g) are cross-motions for judgment on the pleadings.<sup>1</sup> Oral argument was conducted in connection with those motions on December 15, 2023, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Plaintiff’s motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner’s determination that plaintiff was not


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<sup>1</sup> This action is timely, and the Commissioner does not argue otherwise. It has been treated in accordance with the procedures set forth in the Supplemental Social Security Rules and General Order No. 18. Under those provisions, the court considers the action procedurally as if cross-motions for judgment on the pleadings have been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.



David E. Peebles  
U.S. Magistrate Judge

Dated: December 19, 2023  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
LESLIE SCOTT F.,

Plaintiff,

vs.

8:22-CV-1338

COMMISSIONER OF SOCIAL SECURITY,

Defendant.  
-----x

Transcript of a **Decision** held during a  
Telephone Conference on December 15, 2023, the  
HONORABLE DAVID E. PEEBLES, United States Magistrate  
Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

For Plaintiff: COLLINS & HASSELER, PLLC  
Attorneys at Law  
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Carthage, New York 13619  
BY: LAWRENCE D. HASSELER, ESQ.

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1 (The Court and all counsel present by  
2 telephone.)

3 THE COURT: All right. Thank you. Let me begin by  
4 thanking counsel for excellent and spirited presentations.

5 Plaintiff has commenced this proceeding pursuant to  
6 42 United States Code Section 405(g) to challenge an adverse  
7 determination by the Acting Commissioner of Social Security  
8 finding that he was not disabled at the relevant times and  
9 therefore ineligible for the benefits for which he applied.

10 The background is as follows: Plaintiff was born  
11 in October of 1970, he is currently 53 years of age. He was  
12 50 years old at the amended onset date of October 4, 2020.  
13 That is significant as we will see later because that places  
14 him in an advanced age category for purposes of the Medical  
15 Vocational Guidelines in the Commissioner's Regulations.  
16 Plaintiff stands 5 foot 10 inches in height and weighs  
17 approximately 177 pounds. Plaintiff lives in Norfolk,  
18 New York with his father, he's apparently divorced.  
19 Plaintiff has a high school education and while in school he  
20 attended regular classes. He does not have any further  
21 educational or vocational training. Plaintiff has a driver's  
22 license and does own a vehicle.

23 The record is a little equivocal as to when  
24 plaintiff stopped working. At one point it indicates that  
25 occurred on January 1, 2017, but I believe he meant

1 January 1, 2018 from the context. Before stopping work, he  
2 was a line cook at a restaurant, which closed December 31,  
3 2017. Plaintiff did say he would -- he thinks he would have  
4 stayed there working if the restaurant remained open, that's  
5 at page 63 of the Administrative Transcript. While there, he  
6 did not work full time, he worked 20 to 25 hours per week and  
7 was given various accommodations for his physical conditions.  
8 Plaintiff also worked as a driver for a car dealer, taking  
9 vehicles to auction, and was a manager at various Dunkin  
10 Donut franchises. He left that position when his performance  
11 deteriorated due to personal problems -- apparently a  
12 divorce.

13           Physically, plaintiff suffers from degenerative  
14 disk disease of the cervical and lumbar spine and scoliosis.  
15 He underwent surgery in 1987, he is fused to L2 level with  
16 rods. Plaintiff has been in pain management for his  
17 condition since August of 2018. He has attempted to manage  
18 his pain through medication, physical therapy, home exercise,  
19 nerve blocks, and RF ablation.

20           Mentally, plaintiff does not claim to have any  
21 issues that would affect his ability to work.

22           Plaintiff, in addition to his residual neck and  
23 back pain, also suffers from shoulder pain, as well as a  
24 breathing issue for which he uses an inhaler two times per  
25 day. He has hypertension and a couple other nonsevere

1 physical impairments.

2 Plaintiff has been treated by various providers,  
3 including FNP Hillary Heaton from North Country Community  
4 Health Center, Dr. Richard Distefano at SOS, Dr. Aathirayen  
5 Thiagarajah, apparently a pain specialist, and FNP Krista  
6 Switzer, also some sort of pain management nurse  
7 practitioner. Plaintiff is on various medications including  
8 but not limited to gabapentin. Plaintiff is a smoker, he  
9 smokes one pack per day against medical advice.

10 Procedurally, plaintiff commenced this matter by  
11 applying for Title II Social Security benefits on January 29,  
12 2021, alleging an onset date of December 31, 2018. That was  
13 later amended to October 4, 2020, coinciding with his 50th  
14 birthday. A hearing was conducted on October 27, 2021 by  
15 Administrative Law Judge Kenneth Theurer. ALJ Theurer issued  
16 an unfavorable decision on December 1, 2021. That became a  
17 final determination of the agency on November 7, 2022 when  
18 the Appeals Council denied plaintiff's application for  
19 review. This action was commenced on December 12, 2022 and  
20 is timely.

21 In his decision, ALJ Theurer applied the familiar  
22 five-step sequential test for determining disability.

23 At step one he concluded plaintiff had not engaged  
24 in substantial gainful activity subsequent to October 4,  
25 2020.

1           At step two, he concluded that plaintiff does  
2       suffer from severe impairments which impose more than minimal  
3       limitations on his ability to perform basic work functions,  
4       including degenerative disk disease of the lumbar spine,  
5       scoliosis, and degenerative disk disease of the cervical  
6       spine.

7           At step three, ALJ Theurer concluded that  
8       plaintiff's conditions do not meet or medically equal any of  
9       the listed presumptively disabling conditions set forth in  
10      the Commissioner's regulations, specifically considering  
11      Listings 1.15 and 1.16.

12           Administrative Law Judge Theurer next determined  
13      that plaintiff retains the residual functional capacity to  
14      occasionally lift and carry 20 pounds, frequently lift and  
15      carry 10 pounds, sit for up to six hours and stand or walk  
16      for approximately six hours in an eight-hour day with normal  
17      breaks. He can occasionally climb ramps or stairs, never  
18      climb ladders, ropes, or scaffolds and can perform occasional  
19      balancing, stooping, kneeling, crouching, and crawling.  
20      Essentially this is a light work RFC with some modifications.

21           Applying that RFC at step four, ALJ Theurer  
22      concluded that plaintiff is not capable of performing -- I'm  
23      sorry, is capable of performing his past relevant work as a  
24      store manager and operations manager at Dunkin Donuts, it was  
25      a position he held from 2008 to 2012 and constituted



1 substantial gainful activity. The vocational expert  
2 testified that plaintiff is capable of performing that job  
3 notwithstanding his impairments and resulting limitations.

4 As an alternative finding, ALJ Theurer concluded at  
5 step five that there are other jobs plaintiff is capable of  
6 performing notwithstanding his limitations, including cleaner  
7 - housekeeping, cafeteria attendant, and fast food worker,  
8 those are available in the national economy in sufficient  
9 numbers and therefore concluded that plaintiff was not  
10 disabled.

11 As you know, the court's function in this case is  
12 extremely limited to determining whether substantial evidence  
13 supports the resulting determination and correct legal  
14 principles were applied. As the Second Circuit has noted,  
15 including in *Brault v. Social Security Administration*, 683  
16 F.3d 443 from 2012, this is an extremely deferential  
17 standard, more stringent than the clearly erroneous standard  
18 that lawyers are accustomed to. The Second Circuit's  
19 decision in *Brault* and its position concerning the standard  
20 of review was reaffirmed in *Schillo v. Kijakazi*, 31 F.4th 64  
21 from April 6, 2022. Substantial evidence of course is  
22 defined as such relevant evidence as a reasonable mind would  
23 find sufficient to support a conclusion.

24 In this case plaintiff raises three basic  
25 contentions. He argues that plaintiff's -- the ALJ

1     improperly evaluated his subjective complaints of  
2     symptomology; secondly, he argues that the ALJ improperly  
3     evaluated the medical statements of record, including that  
4     from Nurse Practitioner Heaton, and instead favoring the  
5     determinations, the administrative determinations of state  
6     agency consultants; and third, he argues that the  
7     administrative law judge should have addressed the question  
8     of absences and whether plaintiff would be absent more than  
9     allowed by an employer.

10           Turning first to the medical opinions, there are  
11     essentially three opinions in the record. The first is from  
12     a state consultant, Dr. J. Sharif-Najafi, from March 26,  
13     2021. It appears at 70 to 80 of the Administrative  
14     Transcript. The result according to that doctor was that  
15     plaintiff was capable of occasionally lifting 20 pounds,  
16     frequently lifting 10 pounds, standing and/or walking a total  
17     of six hours in an eight-hour workday, sitting about six  
18     hours in an eight-hour workday, frequently climbing ramps,  
19     stairs, occasionally climbing ladders, ropes, scaffolds,  
20     frequently balancing, frequently stooping, frequently  
21     kneeling, frequent crouching, occasionally crawling. As  
22     plaintiff has argued, this particular consultant did not have  
23     available significant records. Page 72 indicates that the  
24     only records reviewed were from the Community Health Center  
25     of North Country, and they were received on March 8, 2021,

1 and Canton Potsdam Hospital, also received in March of 2021.

2 The second opinion of record is again from a state  
3 agency, administrative determination by a state agency  
4 consultant, M. Perrotti, from May 27, 2021, it is at 83 to 95  
5 and appears also at 432 to 433. Dr. Perrotti affirmed the  
6 initial determination. Dr. Perrotti did have additional  
7 records available to him, 83 through 86 reveals the  
8 additional records that were reviewed and there are  
9 significantly more records than were reviewed by his  
10 predecessor.

11 The third opinion in the record is from FNP Hillary  
12 Heaton from North Country Community Health Center, it is  
13 cosigned by Occupational Therapist Stacey Graves. It is  
14 accompanied by a functional capacity evaluation conducted by  
15 Ms. Graves. It is dated July 8, 2021. That appears at 439  
16 to 444 and as I said, it's accompanied by the FCE. The lift  
17 capacity is similar to the RFC, however, it differs in the  
18 following regards. It claims that plaintiff can carry only  
19 up to 10 pounds, can sit five hours out of an eight-hour  
20 workday with breaks 40 minutes at a time, can stand only two  
21 hours in an eight-hour workday 13 minutes at a time. Can  
22 walk one hour out of eight, at five to ten minutes at a time,  
23 can never stoop or crawl, can only occasionally reach,  
24 handle, finger, feel, push, and pull. So there is clearly a  
25 conflict between this medical source statement and the prior

1 administrative determinations.

2           The evaluation of medical evidence in this case is  
3 subject to the new regulations that went into effect in March  
4 of 2017. Under those regulations the Commissioner does not  
5 defer or give any specific evidentiary weight, including  
6 controlling weight, to any medical opinions, including those  
7 from the claimant's medical sources. Instead, the ALJ must  
8 consider whether those opinions are persuasive, by primarily  
9 considering whether they are supported by and consistent with  
10 the record in the case, 20 C.F.R. Section 416.920c(a). In  
11 his or her decision, an ALJ must articulate as to how and why  
12 persuasive he or she finds the medical opinions and explain  
13 how he or she considered those two elements, supportability  
14 and consistency. There are other factors that may and should  
15 be considered but the ALJ is not required to explain  
16 consideration of those factors. 20 C.F.R. Section  
17 416.920c(c). In this case -- and significantly, and case law  
18 is clear, including in *Veino v. Barnhart*, 312 F.3d 578 from  
19 the Second Circuit 2002, evaluation of conflicting medical  
20 reports and opinions is a matter entrusted to an ALJ.

21           In this case, the administrative law judge did  
22 acknowledge the treating relationship of Hillary Heaton,  
23 although Ms. Heaton did not -- had not treated -- let's see.  
24 I take that back. It's clear and the plaintiff's counsel  
25 acknowledged that a state agency administrative determination

1 can supply substantial evidence to support an RFC finding.  
2 *Woytowicz v. Commissioner of Social Security*, 2016 WL  
3 6427787, from the Northern District of New York, October 5,  
4 2016. In this case the administrative law judge found the  
5 opinions of the two state consultants, Dr. Sharif-Najafi and  
6 Dr. Perrotti, to be most persuasive, and Nurse Practitioner  
7 Heaton's medical source statement to be partially persuasive  
8 in that it does coincide when it comes to lifting with the  
9 RFC. The explanation is given on page 18 and page 19 for the  
10 persuasiveness of each of those opinions, and I don't find  
11 any error. The portions of the opinion of Nurse Practitioner  
12 Heaton that are rejected were found to be inconsistent with  
13 the conclusion of Occupational Therapist Graves. It is also  
14 inconsistent with the opinions of Dr. Sharif-Najafi and  
15 Dr. Perrotti. I don't find any error in the weighing of  
16 those opinions which, as I said before, is a matter entrusted  
17 to the Commissioner. I believe the explanation given by  
18 Administrative Law Judge Theurer was proper and permits  
19 adequate judicial review and is supported by substantial  
20 evidence.

21 The second issue, and it's actually the third  
22 issue, is the absenteeism issue. Plaintiff argues that the  
23 RFC should have included a statement as to how often  
24 plaintiff might be absent from work. Of course pivotal to  
25 any disability determination is an RFC assessment, which

1 represents a finding of the range of tasks that claimant is  
2 capable of performing notwithstanding his or her impairments.  
3 Ordinarily that means a claimant's maximum ability to perform  
4 sustained work activities in an ordinary setting on a regular  
5 and continuing basis, meaning eight hours a day for five days  
6 a week or an equivalent schedule. And an RFC of course is  
7 informed by consideration of claimant's physical and mental  
8 abilities, symptomology, and other limitations that could  
9 interfere with work activities on a regular and continuing  
10 basis, as well as all the relevant medical and other evidence  
11 of record.

12 THE CLERK: Judge, I'm sorry to interrupt you, I  
13 think somehow we may have gotten dropped from the call. Can  
14 we check to see if the counselors can still hear us?

15 THE COURT: Can you still hear us? Mr. Hasseler?  
16 Mr. Peck?

17 THE CLERK: I can see us on -- I can see them on  
18 but I no longer see us on. So I think something may have  
19 happened with this.

20 (Pause in Proceedings.)

21 THE COURT: Counsel, apparently for some reason my  
22 phone malfunctioned. Can someone tell me about where I was?

23 MR. PECK: Your Honor, this is Jason Peck, you were  
24 about to -- you had gotten through all the primary stuff and  
25 you were about to I think issue the verdict.

1 THE COURT: Okay. So, did I go through the  
2 contentions that plaintiff raised?

3 MR. HASSELER: Yeah, the last thing I remember, you  
4 cited a couple cases.

5 THE COURT: Which case, do you remember?

6 MR. HASSELER: It was 31 F. -- at 64.

7 THE COURT: Oh, that's *Schillo*.

8 MR. HASSELER: 31 F. --

9 THE COURT: Okay, you'll get a transcript of this,  
10 let me just give you the short version. So I went through  
11 the contentions, I went through evaluation of medical  
12 statements under the new regulations, and I found that  
13 because the evaluation of conflicting medical opinions is a  
14 matter entrusted to the administrative law judge, I did not  
15 find any error. I found that there was a proper explanation  
16 given that permitted adequate judicial review, and that the  
17 resulting determination was supported by substantial  
18 evidence.

19 I truly apologize, we did not notice earlier that  
20 apparently the call had dropped.

21 I also went through the -- I was addressing the  
22 second issue which was really the third issue, absences. I  
23 went through what an RFC determination is, and I was about to  
24 say that plaintiff bears the burden of proving his or her  
25 limitations. I didn't see any evidence in the record,

1 including in plaintiff's testimony, that revealed that he  
2 would be absent from work, and implicit in the state  
3 administrative determinations, there was no reference to  
4 absences there. Nurse Practitioner Heaton was not asked  
5 about absences, and so absent plaintiff coming forward with  
6 some evidence that would support the notion that he would be  
7 absent from work more than one time per month, which I think  
8 is what the vocational expert said is the limit, I find no  
9 error.

10 And the last issue, which was actually the first,  
11 was assessment of plaintiff's subjective reports of  
12 symptomology. An ALJ of course must take into account  
13 plaintiff's subjective complaints when going through the  
14 five-step disability analysis. 20 C.F.R. Section 404.1529(a)  
15 and (b). The ALJ, however, is not required of course to  
16 blindly accept subjective testimony of a complainant, but  
17 instead must assess first whether the claimant has a  
18 medically determinable impairment that can reasonably be  
19 expected to produce the alleged symptoms and if so, evaluate  
20 both the intensity and persistence of those symptoms and the  
21 extent to which those symptoms limit the claimant's ability  
22 to perform work-related activities.

23 The matter is subject to Social Security Ruling  
24 16-3p. Under that ruling, an ALJ should consider factors  
25 including the claimant's daily activities, the location,



1 duration, frequency, and intensity of any symptoms, any  
2 precipitating and aggravating factors, the type, dosage,  
3 effectiveness, and side effects of any medications taken,  
4 other treatment received, and other measures taken to relieve  
5 symptoms. And of course if plaintiff's testimony was  
6 rejected, the ALJ must explicitly state the basis for doing  
7 so with sufficient particularity to enable a reviewing court  
8 to determine whether those reasons for disbelief were  
9 legitimate, and whether the determination is supported by  
10 substantial evidence. *Tome v. Schweiker*, 724 F.2d 711,  
11 Second Circuit 2000 -- 1984, and *Martone v. Apfel*, 70  
12 F.Supp.2d 145, Northern District of New York 1999.

13 In this case, the administrative law judge went  
14 through the treatments received by the plaintiff, 15 to 17 of  
15 the Administrative Transcript. As far as I can see it's  
16 replete with positive findings of x-ray results, CT scan  
17 results, and MRI results. Plaintiff clearly underwent pain  
18 management strategies. Many of those notes cited show  
19 reduced range of motion, failed physical therapy attempts,  
20 tenderness, and positive straight leg raising. The summary  
21 of the administrative law judge's evaluation of plaintiff's  
22 complaints is one paragraph, it is succinct. No matter how  
23 sincere, however, statements by interested parties cannot  
24 overcome evidence of record. Furthermore, an individual's  
25 statements about his or her symptoms alone are insufficient

1 to establish that an individual is disabled. In formulating  
2 the residual functional capacity for the claimant, moreover,  
3 I have accounted for any functional deficits of the plaintiff  
4 by limiting him to light exertional work with some postural  
5 restrictions.

6 In my view, and I have read thoroughly and reread  
7 thoroughly this decision, it is woefully deficient. The  
8 administrative law judge does not explain why in his view the  
9 medical evidence does not support plaintiff's claims of  
10 objective symptomology in a manner that would allow for  
11 sufficient judicial review. I find that this is harmful  
12 error. If plaintiff were limited to sedentary work under the  
13 Medical Vocational Guidelines and particularly Grid Rules  
14 201.12 and 201.14, he would be found to be disabled.

15 This needs to go back to the administrative law  
16 judge for a proper consideration of weighing plaintiff's  
17 subjective complaints and addressing the factors set forth in  
18 SSR 16-3p. There's no reference to what he is capable of  
19 doing, for example, in terms of activities of daily living  
20 and how they would translate to the ability to work full  
21 time.

22 So I'm going to grant judgment on the pleadings to  
23 the plaintiff without a directed finding of disability  
24 because I don't find persuasive evidence of disability, and  
25 remand the matter to the Commissioner for further

1 consideration. Thank you both, hope you have happy holidays.

2 MR. HASSELER: Thank you, your Honor, you too.

3 MR. PECK: Thank you, your Honor.

4 (Proceedings Adjourned, 2:47 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RMR, CRR, CSR, Federal  
Official Realtime Court Reporter, in and for the  
United States District Court for the Northern  
District of New York, DO HEREBY CERTIFY that  
pursuant to Section 753, Title 28, United States  
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proceedings held in the above-entitled matter and  
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the United States.

Dated this 18th day of December, 2023.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RMR, CRR, CSR  
Official U.S. Court Reporter